STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
Cooper, P. J., Jansen and Danhof, J. J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant, Supreme Court No. 123145

v

TIFFANY FREE LIVELY, Court of Appeals No. 233795

Defendant-Appellee. Presque Isle CC No. 00-91835-FH

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BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

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Statement of Questions

The trial court ruled before trial that the materiality of the alleged false statement was a question of law. Thus, the jury was prevented from making a determination of one of the elements of the offense of perjury. Did trial court's ruling violate Appellee's Fifth and Sixth Amendment rights to have her guilt rest on a determination by a jury that she was guilty beyond a reasonable doubt of every element of the crime with which she was charged?

The trial court did not address this question

The Court of Appeals answered this question YES!

Plaintiff-Appellant answers this question NO!

Defendant-Appellee answers this question YES!

Given that materiality is an element of the offense of perjury to be decided by a jury, did the Court of Appeals correctly apply rule that the prosecutor was required to persuade the Court that the error in failing to allow the jury to consider this element was harmless beyond a reasonable doubt?

The trial court did not address this question

The Court of Appeals answered this question YES!

Plaintiff-Appellant answers this question NO!

Defendant-Appellee answers this question YES!

Statement of Jurisdiction

This Court has jurisdiction over this matter by virtue of MCR 7.301(A)(2).

Standards of Review

The standards of review will be set forth in the argument portion of this brief, **infra**.

STATEMENT OF FACTS

Appellee, Tiffany Free Lively, was charged and convicted of perjury in violation of MCL 750.422, MSA 28.664. The trial took place in the Presque Isle County Circuit Court, the Honorable Joseph P. Swallow presiding.

The complaint alleged that Appellee had committed perjury both in an affidavit and in testimony at a hearing to set aside a Default Judgment of Divorce. The essence of her alleged perjury was that she had not been served with divorce papers and that she had no knowledge that a divorce was pending.

At the hearing to set aside the default judgment of divorce, Appellee testified that she did not receive any notice of default but, had received a notice of a September 8, 1999 hearing for a pro confesso divorce. However, she did not understand it and did not know that she was supposed to attend this hearing. Also, she testified that she had not known of any divorce proceeding nor had she received any papers. When confronted with the allegation that she received papers in Onaway, Appellee responded that she had come to pick up her children when her ex-husband had refused to return them. During that incident, she showed her paperwork from a case in Saginaw involving one of the children and she did not see anything that looked like divorce papers. Appellee also indicated that she thought that her meeting with the Friend of the Court in Rogers City

was about "the children's welfare" and denied knowing that the meeting was about a divorce proceeding. (MTD-8; 1b)[1] Appellee's ex-husband also testified as well as the police officer, who filed a proof of service stating that he had served Appellee.

The judge, who heard the divorce case determined that even if Appellee had lied, the statement was not material and set aside the default. The judge's statement clearly expresses his thoughts:

> Well, my inclination would be to set aside the default to be honest It's only ten days old. Some question in my mind – probably not a question in my mind whether she might have known what was going on, but when you try and look at the big picture, he's talking to her the whole time, talking about divorce on a million and one occasions. And he had knowledge of this, himself, as he's talking to her he's telling her, yeah you'll have the children. Doesn't sound to me like a situation where someone ought to be worried about losing her children. And yet apparently that's what would happen here. Doesn't look like it's a big thing whether we set aside the default judgment or not. There's never been a hearing on the merits here. There's never been a serious-when I say serious, I mean an investigation by the Friend of the Court where they considered all the factors and went through them at all with the parties. (MTD-35, 2b)

The judge ultimately concluded that the default should be set aside. He stated that "Listening to it all, it sounds to me like the mother ought to have known there was a divorce going on, but I'm not convinced. So, at any rate, we'll set it aside." (MTD-38, 3b)

Following the setting aside of the default, the attorney for Appellee's ex-husband wrote a letter to the prosecutor for Presque Isle

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[1] MTD refers to the transcript of the hearing to set aside the default judgment in Appellee's divorce case, which is known as the Lively Case No. 99-001835-DM

County asking that action be taken against Appellee for her perjurous testimony. (TR-I-135, 4b)[2]

As stated previously, the prosecutor charged Appellee with the crime of perjury. Based on the statements made by the Circuit Judge who presided over the divorce case, Appellee's counsel filed a motion to dismiss the complaint before the preliminary examination was conducted. Appellee alleged that either, the matter about which she had allegedly lied was not material to the matter before the court that conducted her divorce proceedings or, that the divorce court's decision was proof that it had determined that Appellee had been truthful about her lack of knowledge of the divorce proceedings and, thus, there was no basis for the complaint to have been issued.

The preliminary examination was conducted and the district judge bound Appellee over to Circuit Court for trial on the charge of perjury on May 11, 2000. Following arraignment on June 11, 2000, Appellee filed a motion to quash the information on August 7, 2000. Appellee raised the same issues that she had raised at the district court. The trial court conducted a hearing and denied Appellee's motion. At that time, the trial court determined that Appellee's answers, if untruthful, were material to the divorce case and that they were material as a matter of law. The court determined that no

[2] TR-I refers to the transcript of the trial proceedings that occurred on December 14, 2000.

further argument was necessary on that point. (MTQ-3, 4, 5b-6b)[3] The trial court also rejected the argument advanced by Appellee's counsel that the finding of the circuit judge who heard the divorce case, that Appellee's statements, even if untruthful, did not justify upholding a default judgment of divorce, precluded filing of criminal charges under the principle of cross-over estoppel. The trial judge in the instant case concluded that equitable estoppel principles did not apply. (MTQ-4, 7b)

Trial in this case began on December 14, 2000. David Elder, the attorney for Appellee's ex-husband told the court that he had problems trying to serve the divorce papers. (TR-I-107, 114, 8b, 9b) Eventually, he learned that Appellee was going to be in Onaway so, he delivered the divorce papers to the Presque Isle Sheriff's department and asked that the department make service on her. A return or proof of service was returned to him in about three days. (TR-I-116, 117, 10b-11b) The attorney subsequently entered a default and a default judgment of divorce. (TR-I-119, 121, 12b-13b) Again, as stated previously, the witness wrote a letter after the default judgment had been set aside, urging the prosecutor to take action concerning the perjurous statements made by Appellant.

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[3] MTQ refers to the transcript of the proceedings for the motion to quash that occurred on September 11, 2000.

Matt Torongeau, the person that actually served the papers on Appellee, told the trial court that he remembered Appellee coming to the police station in Onaway and that he served papers on her. He did not recall what papers he served on her. According to him, Appellee signed for the papers and he handed them to her along with papers she had given him when she first arrived. (TR-I-147, 14b) In fact, Matt Torongeau testified that it was his normal practice to identify the person to be served and hand them the papers and fill out the return. (TR-I-148, 15b) He did not fill in the back of the return to show that he had served a copy of the divorce complaint or the verified statement. (TR-I-149, 16b) In fact, Mr. Torongeau never completes the return in proper fashion because he never fills in the blanks on the back of the form and never reviews the documents he served on people. (TR-I-162, 168, 174, 17b, 18b, 19b)

At that point, counsel for Appellee got into an argument with the trial judge over the limiting of Appellee's counsel's ability to conduct a proper cross-examination. This colloquy became rather heated and, at one point, the trial court pointed out that counsel was very close to contempt. (TR-I-157, 20b)

Rosalyn Boyer, an investigator for the Friend of the Court, testified that she sent a package to Appellee concerning the divorce proceedings. She had a telephone conversation with Appellee and

recalled that she told Appellee that a divorce complaint had been filed. (TR-I-181, 21b) After that phone call, she and Appellee had a meeting regarding the custody and visitation issues in the courthouse in Rogers City. She recalled that she again told Appellee that a divorce proceeding was pending. (TR-I-184, 22b) She admitted that the paperwork that she sent to Appellee did not say that this involved a divorce proceeding. She also admitted that she was outraged that she had to do a second report because Appellee had successfully set aside the default judgment of divorce based on a claim that she had had no input into the report of the Friend of the Court. (TR-I-195, 23b)

At the conclusion of the testimony of Ms. Boyer, the prosecution rested its case. (TR-I-203, 24b) The jury was excused and Appellee's counsel requested that the trial court grant a mistrial at that point because of its threat of contempt had humiliated and denigrated Appellee's counsel in the eyes of the jury and that there was no way that could be remedied. There was a long discussion concerning whether counsel should request a curative instruction before asking for a mistrial and the argument became quite heated. (TR-I-203-208, 25b-30b) Ultimately, the trial court denied the motion but suggested that counsel file a request for a curative instruction. (TR-I-208, 31b)

Appellee's counsel also requested that the trial court grant a directed verdict because, even taking the prosecutor's proofs in their

best light, all that had been shown was that a false statement had been made. The prosecutor had failed to show that the statement pertained to a material matter. (TR-I-211, 32b) The trial court rejected counsel's motion because materiality went to the essence of the court's jurisdiction and was a matter of law for the court to decide. (TR-I-213, 214, 33b-34b)

Appellee's cousin, Carrie Glover, testified and stated that she went to the police station in Onaway with Appellee to pick up Appellee's children. She did not see any divorce papers when Tiffany exited the police station. (TR-I-220-222, 35b-37b)

Appellee's aunt, Brenda Gaertner also testified that she drove up from Saginaw to pick up Appellee because the police refused to allow her to drive due to her license being invalid. She testified that Appellee was very upset and crying. Brenda Gaertner did not see any divorce papers in Appellee's possession. (TR-I-240-242, 38b-40b)

Appellee's counsel requested a mistrial due to the trial court's constant interference and commentary on the evidence. Counsel indicated that a curative instruction would be given if a mistrial was not granted. (TR-I-246, 41b)

The next morning Appellee testified. Appellee told the jury that in 1999, she and her ex-husband were still married but separated and that they fought argued or discussed divorce constantly. (TR-II-254-

256, 42b-44b)[4] This matter began when her ex-husband took the children for a two-week visitation but failed to return them at the agreed time and place. (TR-II-255, 256, 45b, 46b) At that point, she went to the Saginaw Friend of the Court to complain about his abuse of visitation. Eventually she came to Onaway to effectuate the return of her children. When she arrived she handed her papers from the Saginaw Circuit Court, which pertained to her oldest child, to the officer at the desk. He looked at them and, after making some calls, told her it would be about a four-hour wait before she could pick them up. (TR-II-258, 259, 47b-48b)

At that time, the officer also confiscated her license because it was invalid due to some unpaid ticket. Appellee then went across the street to have lunch. (TR-II-260, 49b) The officer returned her papers to her. Appellee did not look at them to see whether any other papers were mixed in the package that the officer returned to her. (TR-II-261, 50b) Eventually, her ex-husband showed up and released one child to her and retained the other one. Appellee then went back to Saginaw. She stated that nobody gave her any papers while she was outside the police station.

Subsequently, Appellee received a phone call from the Friend of the Court in Presque Isle County. She thought that the phone call

[4] TR-II refers to the transcript of trial proceedings that occurred on December 15, 2000.

concerned visitation. She did not know that it pertained a pending divorce proceeding. (TR-II-264, 51b) Appellee returned to Rogers City on June 4, 1999 and met with the Friend of the Court. Again, Appellee told the jury that she thought she was there to discuss her visitation problems. According to Appellee, the investigator did not say anything about divorce during the interview. (TR-II-265, 266, 52b, 53b) Appellee was not concerned because she and her ex-husband were still engaging in marital relations at that time. During lunch, Appellee obtained possession of both children and informed the Friend of the Court of this fact when she returned from lunch. Appellee believed that there was nothing else to do so at that point because she had both of her daughters back.

Appellee testified that she, in fact, did nothing until her ex-husband picked up the children from school. She did not understand the notice she received concerned a status conference. She did not appear because the notice did not say she had to be there. (TR-II-269, 54b)

At the conclusion of testimony, Appellee's counsel again requested a directed verdict of acquittal due to a failure show that the alleged false statements were made about a material matter. The court denied the motion. (TR-II-310, 55b)

After counsel for both sides had discussed the jury instructions, final arguments took place. During the prosecutor's rebuttal argument, he commented on the materiality of Appellee's statements at the hearing to set aside the default judgment of divorce. Appellee's counsel immediately objected and requested a mistrial. (TR-II-343, 344, 57b-58b) The trial court sustained the objection and told counsel that materiality was a question of law, not fact, and instructed the jury to disregard any remarks about the materiality of the statement. (TR-II-344, 59b)

The trial court then instructed the jury. The judge did give a curative instruction concerning the differences he had with Appellee's counsel during the trial including the threat of contempt. (TR-II-348, 60b) However, the trial court did not give any instruction to the jury concerning the materiality of Appellee's alleged false statements. The jury convicted Appellee as charged. (TR-II-387-390, 61b-64b)

Appellee then appealed her conviction to the Court of Appeals. On December 3, 2002, the Court of Appeals reversed her conviction. The Court of Appeals found that the question of materiality was an element that must be determined by the jury and the trial court erred in precluding the jury from considering that issue. The Court of Appeals pointed out that this was a preserved constitutional error

determined that the prosecutor was required to demonstrate whether the prosecutor could persuade the Court beyond a reasonable doubt that the error was harmless. The Court of Appeals then reviewed the record and determined that the jury could well have decided to regard the subject matter of Appellee's alleged misstatements as immaterial and concluded that the prosecutor had failed to demonstrate that this error was harmless beyond a reasonable doubt.

This Court has granted Appellant's Application for Leave To Appeal.

Argument

I. The trial court ruled before trial that the materiality of the alleged false statement was a question of law. The trial court did not instruct the jury that the materiality of the alleged false statement was an element of the charge against Appellee. Thus, the jury was prevented from making a determination of one of the elements of the offense of perjury. The Court of Appeals was correct in its determination that the failure of the trial court to allow the jury to consider the materiality of Appellee's alleged false statement in determining her guilt or innocence denied Appellee her constitutional right to have a jury determine every element of the crime with which she was charged.

[Standard of Review]

Appellee agrees that this issue is clearly involves constitutional law. As such, the standard of review is de novo. US v Griffiths 17 F3d 865 (6th Cir, 1994), cert den 513 US 850 (1994), People v Carpentier 446 Mich 19, 60 n19, 521 NW2d 195 (1994).

[Argument]

Both the Federal and Michigan constitutions provide that no person shall be deprived of life, liberty or property without due process of law. U.S. Const., Am V, Const 1963, art I, sec 15. Further, both Federal and Michigan constitutions provide that every accused in a criminal case has the right to a speedy and public trial by an impartial jury. U.S. Const., Am VI; Const 1963, art I, sec 20.

In the case at bar, the trial court violated these constitutional protections by deciding that the alleged false statements made by Appellee were material to

her divorce case, thereby precluding the jury from making its own independent assessment of Appellee's guilt or innocence.

The trial court's ruling was contrary to the established law of the United States Supreme Court. That court has held that the above constitutional amendments require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged beyond a reasonable doubt. Sullivan v Louisiana 508 U.S. 275, 113 S. Ct. 2078, 124 L Ed2d 182 (1993). The right to have a jury make the ultimate determination of guilt has an impressive resume. For example, Blackstone described "trial by jury" as requiring that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal should afterward be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors. 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)

The eminent Justice Story, long ago wrote that the "trial by jury" guaranteed by the Constitution was "generally understood to mean a trial by a jury of twelve men, impartially selected who must unanimously concur in the guilt of the accused before a legal conviction can be had. 2 J. Story, Commentaries on the Constitution of the United States 541, n. 1 (4th ed, 1873) This right was designed to guard against a spirit of oppression and tyranny on the part of rulers and was from very early times insisted on by our ancestors in the parent country as the great bulwark of their civil and political liberties. (id at 540-541)

In Williams v Florida 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed 2d 446 (1973) the Court held that the "essential feature of a jury"... is "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen... [in] that group's determination of guilt or innocence, (id at 399 U.S. 100, 90 S Ct 1905)

Recently, the United States Supreme Court had the opportunity to address the materiality issue in perjury prosecutions. United States v Gaudin 515 U.S. 506, 115 S. Ct. 2310, 132 L Ed.2d 444 (1995), concerned an individual who was accused and convicted of making false statements in a matter within the jurisdiction of a federal agency. The specific issue presented was whether it was constitutional for the trial judge to refuse to submit the question of "materiality" to the jury. The Supreme Court applied the constitutional principles set forth above and unanimously concluded that the trial judge's refusal to allow the jury to pass on the "materiality" of the defendant's false statements infringed that right.

The court discussed the arguments proffered by the government and dismissed them in order. First, the government argued that the principle that requires a jury to decide all the elements when determining guilt or innocence, that this applied only to factual components of the offense. The Court made short work of this argument. The court pointed out that deciding whether a statement is material required the determination of at least two subsidiary questions of purely historical fact: (a) what statement was made? and, (b) what

decision was the agency trying to make? The ultimate question (c) whether the statement was material to the decision requires applying the legal standard of materiality to these historical facts. The government was apparently arguing that the Constitution required only that (a) and (b) be determined by the jury and that (c) could be determined by the judge. The Supreme Court had no difficulty rejecting that argument. It simply said that such application of legal-standard-to-fact sort of question posed by (c) was nothing more than a mixed question of law and fact, which had traditionally been resolved by juries. (Gaudin, supra at 115 S Ct at 2314) The Court also found that the government's position had no historical support.

Second, the government argued that, even if the jury was entitled to pass on all elements of a crime, there was an historical exception for materiality determinations in perjury prosecutions. The court reviewed the history of this practice and pointed out that the practice was neither, as old or as uniform as the government suggested. In sum, the court found that there existed nothing like a consistent historical tradition supporting the proposition that the element in perjury prosecutions was to be decided by the judge.

Finally, the Court rejected the government's argument the principle of stare decisis required it to deny the defendant's constitutional claim.

Appellant has now changed its tune about the applicability of Gaudin supra. Appellee points out that, in its brief in the Court of Appeals, Appellant essentially conceded that Gaudin required a rewrite of the jury instructions and

that the trial court may have erred by not submitting the question of materiality of the false statement to the jury. Appellant now appears to argue that this case is different than Gaudin because, in Gaudin, the issue of materiality was conceded and was specifically mentioned in the statute. Appellee argues that whether the prosecutor conceded that the materiality of the statement was an element is irrelevant. In fact, Appellee contends that if an element of a criminal offense is not conceded, the traditional method of deciding whether or not such element has been proven is to present the evidence as to that element to the trier of fact. In this case that meant the jury. In this case, the record is clear that the trial court precluded the jury from considering the materiality of the alleged false statement.

In the case at bar, the trial judge's refusal to allow the jury to pass on the question of credibility clearly violated the principles set forth in the first argument utilized by the United States Supreme Court. In short, it was okay for the jury to determine what statement was made; and it was okay for the jury to determine what decision was the court trying to make but it was not okay for the jury to determine whether Appellee's statements were material to the circuit judge's decision to set aside the default judgment in Appellee's divorce case.

The essence of Appellant's argument is two-fold. First, Appellant argues that the language of the perjury statute, by not containing the word "material" means that materiality is not required. Their argument is that all that is necessary to convict one charged with perjury is to show that a false statement

was made. The other prong of Appellant's argument is that Michigan courts have not addressed the issue of materiality in a perjury case before the case at bar and that the few cases that have addressed the question erroneously concluded that materiality was an element of a prosecution for perjury. Appellee maintains that Appellant is wrong.

The Michigan Supreme Court in People v Ramos, 430 Mich 544, 424 NW2d 509 (1988) reviewed the historical underpinnings of the law of perjury. Justice Boyle pointed out that "At its origins in the ecclesiastical courts, the Star Chamber, and English common law, the offense of perjury was limited to false oaths in judicial proceedings." (id at p 573) The Michigan Supreme Court further stated that "Perjury is a false oath in a judicial proceeding in regard to a material matter." (id at p. 573)

The commentators and legal dictionaries define the offense in similar fashion. For example, Black's Law Dictionary defines perjury as follows:

> In criminal law. The willful assertion as to a matter of fact opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise **such assertion being material to the issue or point of inquiry** and known to such witness to be false. Black's Law Dictionary, 4th Ed., p. 1297 (emphasis added)

Similarly, Gillespie's Michigan Criminal Law and Procedure describes the law of perjury as follows:

> It is fundamental that both the oath and the facts sworn to must be material in order to justify a conviction for perjury. While perjury under the statute is defined as a willful false swearing in regard to

> any matter or respect to which such oath is authorized or required, **it is always necessary to show that the alleged false swearing was In regard to a material fact.** Gillespie, Michigan Criminal Law and Procedure Sec 2000 at p. 9. (emphasis added)

The current standard of proof with regard to perjury is succinctly stated in People v Forbush 170 Mich App 294, 427 NW2d 622 (1988). There the court stated as follows:

> The elements of perjury are (1) the administration to the defendant of an oath authorized by law, by competent authority; (2) an issue or cause to which facts sworn to are material; and (3) wilful false statements or testimony by the defendant regarding such facts.

The Michigan Supreme Court, long ago, noted the critical importance of the materiality requirement, which clearly defines Appellant's overall burden of proof necessary to sustain criminal perjury charges. In People v Vogt 156 Mich 594, 121 NW 293 (1909), the defendant was convicted of falsely testifying in a divorce case about the length of his residency in Detroit. The Michigan Supreme Court unanimously reversed the conviction, concluding that the information was fatally defective because "there is no specific charge of the materiality of the testimony, which he in fact gave... Except where the materiality of it sufficiently appears from the oath itself, the materiality of that part of the oath in which perjury is assigned should be averred." Id, supra at 121 NW 294. In the instant case, materiality was alleged but not proven by Appellant, rather it was proven by the trial judge, who declared the statements to be material.

More recently, the Michigan Supreme Court reaffirmed the importance of both the materiality and strong corroborating circumstance requirements for perjury prosecutions. In People v Cash 388 Mich 153, 200 NW2d 83(1972), the Court overturned the defendant's convictions on three perjury counts premised on the defendant's statements given before an Oakland County one-man grand jury, which had been impaneled to investigate allegations of bribery and public corruption.

One conviction concerned the defendant's denial that he had ever told anyone there was "money set aside" for him "by the numbers men". The prosecution had a tape recording of the defendant making such an admission in the presence of two witnesses while visiting a patient in William Beaumont Hospital. The Michigan Supreme Court set this conviction aside on materiality grounds. The Supreme Court noted that "Whether defendant ever told anyone that any money was set aside for him by the numbers men is not alleged to be material to the question to-wit – whether certain crimes, offenses or misdemeanors have been committed." People v Cash supra 200 NW2d at 86. When this principle is applied to the case at bar, it is clear that the charges against Appellee should have been dismissed. The allegation here was nothing more than a bare allegation that the alleged false statement by Appellee was material. This statement amounted to nothing more than a conclusion. There was no specification as to why her statement was material or on what issue it was material. The ruling by the circuit judge, who presided over the hearing to

set aside the default judgment clearly demonstrated that even if Appellee was served and knew of the divorce proceeding, the default was to be set aside. Appellee asserts that once the judge, who presided over her divorce proceedings made this determination, there could be no showing of materiality.

The second perjury conviction in Cash, supra, concerned the defendant's sworn accusations before the grand jury that he had seen the people's chief investigative officer, (a state trooper), fondling a prostitute in a patrol car, talking about "how he would get her one day". Both the state trooper and the prostitute testified at defendant's perjury trial that this anecdote was pure fiction. The Supreme Court set aside this conviction, also on materiality grounds. The Court noted that "The crimes, offenses, and misdemeanors the Judicial inquiry was to investigate did not include the asserted sex offenses by Trooper Aird or anyone else." People v Cash, supra at 200 NW2d 86. Again, the principle expressed in Cash is parallel to the case at bar. In the instant case, the circuit judge in the divorce case made it plain that the issue of service was not the primary basis for setting aside the default judgment of divorce. The circuit judge in the divorce proceeding determined that equity required that the default be set aside because the parties had been discussing divorce over a long period of time and that there had been no hearing on the merit. Thus, even if one assumes that Appellee made a false allegation, it was not material to anything. Simply put, it was not the reason that the default was set aside.

Michigan law is very sparse on this issue. The two most recent cases are People v Noble 152 Mich App 319, 393 NW2d 619 (1986) and People v Hoag 113 Mich App 789, 318 NW2d 579 (1982). Neither of these cases is helpful. People v Noble, supra simply cites to Hoag, supra and declares that materiality was an issue for the court to decide. People v Hoag concerned a perjury prosecution that arose out of a statement he made during the prosecution of another man for murder. The defendant was convicted of perjury and he claimed that the court improperly refused to allow the jury to determine the materiality of his alleged false statements. He relied on the case of People v Kert 304 Mich 148, 7 NW2d 251 (1943). In that case, the question of materiality was allowed to go to the jury. The court in Hoag, referred to earlier cases that it said declared that the question of materiality in perjury cases, was for the court and not the jury. See People v McElheny 206 Mich 51, 172 NW 546 (1919); People v Almashy 229 Mich 227 201 NW 231 (1924) The court distinguished Kert, supra by saying that even though the issue of materiality went to the jury, the judge still had to pass on the materiality of the questions when propounded.

Appellee points out that the earlier decisions relied on by the Hoag court did not decide whether the materiality of an alleged false statement was a decision for the judge or one for the jury. McElheny does not say that the decision of materiality of an allegedly false statement was a question for the jury or for the judge. McElheny simply stands for the proposition that the challenged evidence was material to the prosecution for perjury. It does not answer who

makes that decision. Similarly, Almashy, only concerned the question of what evidence was material in a perjury action. Thus, Hoag's legal underpinnings for the principle that materiality is a question for the court are weak.

Appellee asserts that the better logic is the reasoning found in Gaudin supra. It is based on solid federal constitutional principles, which Appellee contends apply to the Michigan constitution. Certainly, the standard set by the decision of the trial court in this case is less than the federal constitutional standard. It does not take any citation or research to know that the state is free to set a higher standard but it cannot set a lower standard, constitutionally.

Appellee also maintains that the issue of whether materiality is an element of a perjury prosecution has been already decided by this Court on several occasions. The Court should stand by its earlier rulings as they are consistent with the principle enunciated in Gaudin and with the constitutional requirement that criminal convictions must rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

Appellant to argues that no reasonable juror would have entertained a reasonable doubt that Appellee's testimony, at her hearing on her motion to set aside her default judgment in her divorce case, was material to that proceeding. Appellee submits that is exactly the problem created by the trial court's approach. By declaring that the materiality of her testimony during her divorce proceeding was an element to be determined by the court, the trial court

anointed itself as the sole finder of the facts, which was the jury's f unction. Appellee points to the words uttered by the United States Supreme Court in Gaudin supra at p. 515

> The existence of a unique historical exception to the principle , and an exception that reduces the power of the jury precisely when it is most important, i.e., in a prosecution not for harming another individual, but for offending the Government itself, would be so extraordinary that the evidence for it would have to be convincing indeed. It is not so.

In sum, the trial judge violated Appellee's constitutional right to due process of law found in the Fifth Amendment and the right to have a jury make the determination of her guilt or innocence as promised by the Sixth Amendment. This is wrong. The jury was precluded from doing its constitutional duty to not merely determine the facts but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence. The United States Supreme Court in Court of Ulster City v Allen 442 U.S. 140 99 S Ct 2213 60 L Ed 2d 777 (1979) said it best at p. 156:

> ...the trier of fact to determine the existence of an element of the crime--- that is, an ultimate or elemental fact--- from the existence of one or more evidentiary or basic facts... Nonetheless in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the fact-finder's responsibility at trial based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

In the case before the Court the trial judge's determination that, Appellee's statement was material to the divorce action, amounted to the trial court making the determination of the ultimate fact. That was the jury's responsibility not the

court's. The Court of Appeals recognized this basic principle when it reversed Appellee's conviction. This court should hold that Appellee's constitutional rights were violated and uphold the decision of the Court of Appeals.

II. Given that materiality is an element of the offense of perjury to be decided by a jury, the Court of Appeals correctly applied the rule that the prosecutor was required to persuade the Court that the error in failing to allow the jury to consider this element was harmless beyond a reasonable doubt.

[Standard of review]

Appellee agrees that whether the error in this case was harmless beyond a reasonable doubt is an issue of law. Issues of law are reviewed de novo. People v Mass 464 Mich 615; 628 NW2d 540 (2001); People v Kreuger 466 Mich 50; 643 NW2d 223 (2002)

[Argument]

Appellant argues that the Court of Appeals erred by finding that the error in this case was not harmless beyond a reasonable doubt. Appellant asserts that Appellee failed to properly preserve the issue of materiality for review because she did not specifically object to the instruction given by the trial court. This is nonsense. The record is replete with efforts by Appellee's counsel to dismiss the case because the element of materiality had not been established. The record also demonstrates the trial court's consistent expression of its opinion that materiality was a question of law for it to decide. Further, Appellee did attempt to include an instruction of her own that addressed materiality. Appellee futher notes that the trial court specifically instructed the jury to ignore any remarks of counsel concerning the issue of materiality. Appellee thus maintains that Appellant's assertion that she failed to preserve the error is not in accord with the facts of this case.

Given that Appellee did preserve the error on more than one occasion, Appellant's argument that the plain error rule applies has no merit.

Appellant also argues that the Court of Appeals misapplied the harmless beyond a reasonable doubt test. Appellant claims that the Court of Appeals originally stated the test as being whether the jury could have found Appellee's assertions that she lacked notice did not affect the outcome of the motion to set aside the default. Appellee points out that the Court of Appeals did not state this as the test. This statement was merely an observation by the court as to a fact that could have affected the outcome. The Court of Appeals, in fact, did understand the correct test to be whether the alleged false testimony could have affected the outcome, not whether it actually did so.

In conclusion, the Court of Appeals correctly determined that the error in this case was of constitutional import, but not a structural defect and, consequently, Appellant was required to demonstrate that the error was harmless beyond a reasonable doubt. Appellant failed and the Court of Appeals' decision should be upheld by this Court.

RELIEF REQUESTED

WHEREFORE, Appellee for the reasons set forth in her brief, requests this Court affirm the decision of the Court of Appeals and remand this case to the trial court for a new trial at which the question of the materiality of Appellee's alleged misstatements will be determined by a jury.

DATED OCTOBER 1, 2003:

RESPECTFULLY SUBMITTED

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ATTORNEY FOR APPELLEE
TIFFANY FREE LIVELY